

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 2401-0251-10
ROBERT ANDERSON,)	
Employee)	
)	Date of Issuance: June 18, 2012
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
Agency)	Joseph E. Lim, Esq.
)	Senior Administrative Judge

Robert Anderson, Employee *pro se*
Iris Barber, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 2, 2009, Robert Anderson (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“the OEA” or “the Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) action of terminating his employment through a Reduction-in-Force (“RIF”). The effective date of the RIF was November 2, 2009. Employee’s position of record at the time his position was abolished was an ET-15 Elementary School Teacher at Patterson Elementary School (“Patterson”). Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 7, 2012. On February 16, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statutes, and regulations. Agency complied, but Employee failed to do so. I then issued a Show Cause Order to Employee to explain her non-compliance by May 21, 2012. Again, Employee failed to respond. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Agency’s action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. Public Schools Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools¹.

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02², which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, section § 1-624.08 states in pertinent part that:

(a) *Notwithstanding any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect for the fiscal year ending September*

¹ See *Agency's Answer*, Tab 1 (January 7, 2010).

² D.C. Code § 1-624.02 states in relevant part that:

(a) Reduction-in-force procedures shall apply to the Career and Educational Services... and shall include:

(1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
(2) One round of lateral competition limited to positions within the employee's competitive level;
(3) Priority reemployment consideration for employees separated;
(4) Consideration of job sharing and reduced hours; and
(5) Employee appeal rights.

30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding*** any rights or procedures established by any other provision of this subchapter, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.

(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that “the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency.”³ The Court also found that both laws were current and that the government triggers the use of the applicable statute by using “specific language and procedures.”⁴

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools (“DCPS”) conducted a 2004 RIF “to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005.”⁵ The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act (“the Act”) instead of “the regular RIF procedures found in D.C. Code § 1-624.02.”⁶ The Court stated that the “ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF.”⁷

³ *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).

⁴ *Id.* at p. 5.

⁵ *Washington Teachers' Union, Local #6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).

⁶ *Id.*

⁷ *Id.*

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for the purpose of addressing budgetary issues resulting in a RIF.⁸ The Act provides that, “notwithstanding any rights or procedures established by any other provision of this subchapter,” which indicates that it supersedes any other RIF regulations. The use of the term ‘notwithstanding’ carries special significance in statutes and is used to “override conflicting provisions of any other section.”⁹ Further, “it is well established that the use of such a ‘notwithstanding clause’ clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other sections.”¹⁰

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.¹¹ Moreover, the persuasive language of § 1-624.08, including the term ‘notwithstanding’, suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

1. That he did not receive written notice thirty (30) days prior to the effective date of his/her separation from service; and/or
2. That he was not afforded one round of lateral competition within his/her competitive level.

Employee’s Position

Employee submits that he was treated unfairly by Agency as he had been a highly qualified, excellent teacher; that the actions of the school administration in merging two schools into one and having three changes in principals last year had negatively impacted on his job and his ability to get another position; and that he was placed in a co-teaching position when his contract states that he has the right to have a classroom assignment.¹² Employee also notes that Agency has provided insufficient evidence to support the allegations in the Competitive Level Documentation Form (“CLDF”), and requests an evidentiary hearing for the purpose of determining the veracity of such allegations.

Agency’s Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his termination. Agency further maintains that it utilized the proper competitive factors in implementing the RIF

⁸ *Id.* at 1125.

⁹ *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).

¹⁰ *Id.*

¹¹ *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)

¹² Employee Petition at Section C (December 2, 2009).

and that the lowest ranked ET-15 Elementary School Teacher, Employee, was terminated as a result of the round of lateral competition.

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based “upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office.” For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;
2. The job title for each employee; and
3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.¹³

Here, Patterson was identified as a competitive area, and ET-15 Elementary School Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were twenty-one (21) ET-15 Elementary School Teacher positions subject to the RIF. Of these positions, six (6) positions were identified to be abolished.

Employee was not the only ET-15 Elementary School Teacher within his competitive level and therefore, was required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:

- (a) Significant relevant contributions, accomplishments, or performance;

¹³ Agency Brief at pp. 2-3 (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

- (b) Relevant supplemental professional experiences as demonstrated on the job;
- (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
- (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

- (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
- (b) Significant relevant contributions, accomplishments, or performance – (10%)
- (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
- (d) Length of service – (5%)¹⁴

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form (“CLDF”) in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Patterson was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the “length of service” category was completed by the Department of Human Resources (“DHR”).

Employee received a total of sixteen (16) points on his CLDF, and therefore, was ranked among the lowest in his respective competitive level. Employee’s CLDF stated, in pertinent part, the following:

“Mr. Anderson has not maintained a constructive, well-managed, and rigorous learning environment for the 6th grade all-male class. After the onset of the school year, the assistant principal observed that he did not have posted objectives, nor an agenda, and the observed lesson was

¹⁴ It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. See *White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

unorganized, unproductive and failed to engage students. In addition, Mr. Anderson delivered information that was factually inaccurate when teaching students how to divide words into syllables. Classroom management has been an abiding struggle as the students are frequently disrespectful, off-task, and disengaged...Mr. Anderson's current performance is not conducive to assisting the school to achieve its goals."¹⁵

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received a total of two (2) points out of a possible ten (10) points in this category; a score much lower than other employee's within his competitive level. His weighted score was fifteen (15) points. Employee disagrees with the score afforded to him.

Moreover, the principal of Patterson was given the discretion to complete Employee's CLDF. Employee has failed to provide credible evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to his work, licenses or other specialized education.

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.¹⁶ Agency cites to *American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given "broad authority to issue regulations governing the release of employees under a RIF...including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority." I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Significant relevant contributions, accomplishments, or performance

This category is weighted at 10% on the CLDF. This category evaluates any clear, significant contributions made by employees, above what would normally be expected of an employee in his or her competitive level. Employee received zero (0) points in this area and alleges that this is unfair. Employee has not offered any documentation to supplement points in this area.

I incorporate by reference my reasoning from above and I find that in this matter, I will not substitute my judgment for that of the school's principal as it relates to the score the principal accorded to Employee and his colleagues in the instant matter.

Relevant supplemental professional experiences as demonstrated on the job

¹⁵ Agency Brief, Exhibit B (March 8, 2012).

¹⁶ Agency Brief at pp. 4-5 (March 8, 2012).

This category accounts for 10% of the CLDF. Employee received zero (0) points in this area and contends that the CLDF did not account for his significant contributions to the school. Employee has not provided any documentation to supplement additional points being awarded in this area. Considering as much, I again find that Employee's arguments to the contrary are unconvincing.

Length of service

This category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an “outstanding” or “exceeds expectations” evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Employee received one point in this category for his years of experience. He did not have an “outstanding” or “exceeds expectations” performance ratings for the prior year to warrant additional points. Employee did not contest the points awarded in this category. Therefore, I find that Agency properly calculated this number.

In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that “school principals have total discretion to rank their teachers” and noted that performance evaluations are “subjective and individualized in nature.”¹⁷ According to the CLDF, Employee received a total score of sixteen (16) after all of the factors outlined above were tallied and scored. The next lowest colleague who survived the instant RIF received a total score of fifty-six (56). Employee has not proffered any credible evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.¹⁸

Accordingly, I find that the principal of Patterson had discretion in completing Employee's CLDF, as he was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute “...interpretations of their worth against [the] principals' evaluations.”¹⁹ While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record would lead the Undersigned to believe that the RIF was conducted unfairly. I therefore find that Agency did not abuse its discretion in

¹⁷See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

¹⁸See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law.)

¹⁹*Washington Teachers' Union* at 780.

completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Thirty (30) days written Notice

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that “an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee’s status and appeal rights.” Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (Emphasis added).

Here, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee’s position is being abolished as a result of a RIF. The Notice also provides Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Grievances

Employee’s other issues, such as his gripe about management changes in his school, his co-teacher status, and Agency’s alleged unfair treatment, can best be characterized as grievances. None of these arguments can be heard by this Office in a RIF appeal. As set forth above, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that he was not afforded one round of lateral competition within his competitive level; and/or 2) that he was not given 30-days notice prior to the effective date of his separation. Employee’s arguments do not fall within either of these areas. In essence, Employee’s complaints are grievances. But as of October 21, 1998, this Office no longer has jurisdiction over grievance appeals.²⁰ Because this Office does not have jurisdiction over the Employee’s grievances, I cannot consider the merits of his claims.

Failure to Prosecute

In addition, OEA Rule § 621.3, 59 D.C. Reg. 2129 (2012) provides as follows:

If a party fails to take reasonable steps to prosecute or defend an appeal, the

²⁰ Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, restricted the Office’s jurisdiction to the following: 1) a performance rating which results in removal of the employee; 2) an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or 3) a RIF. Further, since the passage of OPRAA, this Office has consistently held that grievances are not within our jurisdiction. See, e.g., *Scott v. D.C. Public Schools*, OEA Matter No. J-0005-02 (July 17, 2002); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); *Phillips-Gilbert v. Department of Human Services*, OEA Matter No. J-0074-99 (May 24, 1999); *Brown et al. v. Metropolitan Police Department*, OEA Matter Nos. J-0030-99 *et seq.* (February 12, 1999. See also OEA Rules sections 604.1 and 604.3 regarding jurisdiction.

Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant.” Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:

- (a) Appear at a scheduled proceeding after receiving notice;
- (b) Submit required documents after being provided with a deadline for such submission; or
- (c) Inform this Office of a change of address which results in correspondence being returned.

Employee was warned in each order that failure to comply could result in sanctions including dismissal. Employee never complied. Employee’s behavior constitutes a failure to prosecute his appeal and that is another sound cause for dismissal.

Conclusion

Based on the foregoing, I find that Employee’s position was abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I therefore conclude that Agency’s action of abolishing Employee’s position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in his removal is upheld.

ORDER

It is hereby ORDERED that Agency’s action of abolishing Employee’s position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge